IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 361 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAMIDABIBI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 361 of 1997

MR RJ GOSWAMI for Petitioner No. 1

MR VM PANCHOLI, APP for Respondent No. 1

MR CHETAN K PANDYA for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

Date of decision: 29/04/2005

C.A.V. JUDGEMENT

This revision under Sec.397 read with Sec.401 of the Code of Criminal Procedure has been filed to quash and set aside the order dated 27-5-1997 passed in

Criminal Revision Application No.56 of 1997 by the learned Addl. City Sessions Judge, Court No.12, Ahmedabad, whereby the learned Judge set aside the order dated 13-12-1996 passed by the learned lower Court in Misc.Criminal Application No.109 of 1996 granting maintenance.

2. The case in short is that an application under Sec.125 of the Code of Criminal Procedure ('Code' for short) numbered as Misc.Cri.Appln.No.169 of 1992 was filed by the present petitioner, original applicant, for maintenance before the Metropolitan Magistrate, Ahmedabad. After recording the oral evidence, learned Magistrate vide order dated 13-12-1996 ordered to grant maintenance to the petitioner @ Rs.450/- per month. Being aggrieved and dissatisfied by the said order, the respondent No.2 filed Criminal Revision Application No.56 of 1997 before the City Sessions Court at Ahmedabad. The said revision was allowed whereby order granting maintenance passed vide order dated 13-12-1996 by the learned Metropolitan Magistrate was set aside. Hence, the present revision has been preferred by the original applicant.

3. When this revision came up for hearing, it was rejected by this Court (Coram: N.J.Pandya,J, as was then) vide oral order dated 14-8-1997 on finding the order of the learned Addl. Sessions Judge to be correct exercise of jurisdiction vested in him.

4. Being aggrieved by the said order of rejection, the original applicant approached the Apex Court by way of preferring Criminal Appeal No.978 of 1999. Upon perusing the record and hearing the learned counsel appearing for the respective parties, the Apex Court vide order dated 7-10-2004 has passed the following order:

> "Heard learned counsel for the parties.
>
> Learned Single Judge of the Gujarat High Court has held that since it was not asserted that the appellant was the wife of respondent No.2, there was no question of her getting any maintenance under section 125 of the Code of Criminal Procedure, 1973 (In short 'the Code'). The High Court, however, noticed that in the application as well as in the evidence, it had been clearly asserted that the appellant and the respondents were staying together as husband and wife. The High Court felt that this was not sufficient for the appellant to get maintenance

in terms of Section 125 of the Code. Prima facie view taken by the High Court cannot be maintained in view of what has been held in Dwarika Prasad Satpathy vs. the Bidyut Prava Dixit & Anr. 1999(7) SCC 675. The factual position has to be tested in the background of law laid down by this Court in Dwarika Prasad's Case (supra). Therefore, we remit the matter to the High Court to consider the matter in the light of the Dwarika Prasad' case. Since the matter is pending since long, it would be appropriate if the matter is disposed of by the end of January, 2005. To avoid unnecessary delay, let the parties appear before the Bench of the High Court, assigned for the purpose of hearing such matters, in terms of the roaster fixed by Hon'ble the Chief Justice of that Court, without further notice on 13th November, 2004.

The appeal is disposed of accordingly."

5. In view of the aforesaid order passed by the Apex Court, this revision was placed before the Court (Coram: D.N.Patel,J.) wherein vide order dated 13-12-2004 issued notice for final disposal returnable on 29-12-2004. Notice issued to the respondent No.1 was waived by learned APP, Mr.K.P.Rawal. However, direct service was permitted qua the respondent No.2 to be served through the office of Commissioner of Police, Ahmedabad. In pursuance of which, learned advocate, Mr.Jayprakash Kumot for Mr.C.K.Pandya appeared on behalf of the respondent No.2 and sought time as he was not having papers of the case. Hence, the matter was ordered to be listed on on separate Board for final hearing.

6. When the matter came up before another Court, the Court (Coram: A.L.Dave,J.) ordered to place the matter before appropriate Court. Hence, the matter was placed in my Court on obtaining permission from Honourable the Chief Justice.

7. I have heard Mr.R.J.Goswami, learned counsel for the petitioner, Mr.V.M.Pancholi, learned APP for the respondent and Mr.Chetan K.Pandya, learned counsel for the respondent No.2.

8. Rule. Mr.V.M.Pancholi, learned APP for the respondent and Mr.Chetan K.Pandya, learned counsel for the respondent No.2 waive service of notice of rule.

9. Mr.R.J.Goswami, learned counsel for the

petitioner has taken me through the photographs (Exs.15 to 30) and the law laid down by the Apex Court and argued that in this case, Society has also accepted the petitioner and the respondent No.2 as wife and husband. In these circumstances, maintenance is required to be awarded by the court. According to him, the proof of marriage will be different in the maintenance under Sec.125 of Cr.P.C. and he has requested that as directed by the Apex Court, the matter may be decided on the basis of law laid down by the Apex Court.

10. Mr.Chetan K.Pandya, learned counsel for the respondent No.2 has vehemently argued that the order passed by the lower Appellate Court is just, legal and proper and does not require any interference. It has also been argued that the lower Appellate Court has rightly held that the Society has not accepted the respondent No.2 and the petitioner as husband and wife and there is no strict proof to that effect and, therefore, the Court should not interfere with the said finding. It has also been argued that the respondent No.2 is a married person and, therefore, in any circumstances, if the Court comes to the conclusion that she is also the wife of the respondent No.2, then the petitioner is to be treated as the second wife and, therefore also, she is not entitled to maintenance on any ground. He has relied upon the case of Samir Mandal Vs. State of Bihar and another, (2001)10 Supreme Court Cases 50 more particularly towards head note which reads as under:

> "Criminal Procedure Code, 1973--S.125--Claim of maintenance by wife from husband--Requirement of proof of marriage between the parties--Finding recorded by the Magistrate in another case under S.494 IPC, which was filed by the respondent who is alleging to be the wife of appellant, that the respondent had failed to establish her marriage with appellant or an alleged second marriage by the appellant--Held, in view of the said finding, respondent cannot claim maintenance under S.125 from appellant."

11. Before proceeding further into the matter, it is required to be noted that the matter was remitted by the Apex Court to decide the same in the background of law laid down by this Court in Dwarika Prasad Satpathy vs. the Bidyut Prava Dixit & Anr. 1999(7) SCC 675. Hence, the law laid down by the Apex Court in Dwarika Prasad's Case is required to be gone into. It was held by the Apex Court in paragraphs 6 and 13 of the aforesaid

reported judgment as under:

"6. Learned counsel for the appellant at the time of hearing had not disputed the paternity of the child. Hence, the question is whether the marriage between the appellant and Respondent No.1 was valid or invalid ? In our view, validity of the marriage for the purpose of summary proceedings under Section 125 Cr.PC is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 IPC. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption. Undisputedly, marriage procedure was followed in the temple, that too, in the presence of the idol of Lord Jagannath, which is worshipped by both the parties. The appellant contended before the learned Magistrate that the said marriage was performed under duress and at the point of a knife, he was required to exchange garlands. That contention is not proved by leading necessary evidence. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125 CR.PC."

"13. Hence, in our view from the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Section 125 CR.PC which are of a summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under Section 125 CR.PC can approach the civil court for declaration of status as the order passed under Section 125 does not finally determine the rights and obligations of the parties."

12. It has been held by the Apex Court in Dwarika Prasad's case (Supra) that validity of the marriage for the purpose of summary proceedings under Section 125

Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 IPC. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption.

13. In view of the aforesaid law laid down by the Apex Court, the factual position of the present case may be stated. In the present case, it appears from the evidence of neighbour of the petitioner namely, Jenabbibi Kadarbhai, who has been examined at Ex.4 that the petitioner and the respondent No.2 were staying together as wife and husband since last many years. Moreover, the evidence of photographer namely, Prakashbhai Chandubhai who has been examined at Ex.6 shows that the protographs of the petitioner with the respondent No.2, which were produced on record (Exs.15 to 30), were taken by him. Since the respondent No.2 and the petitioner stayed together for a period of 8-10 years under one roof, an inference can be drawn that they lived together as husband and wife. Moreover, there is no evidence on record that previously the respondent No.2 married with one Lilaben and it is in existence. Said, Lilaben has also not been examined by the respondent No.2. Therefore, it cannot be said that the respondent No.2 was previously married with Lilaben and said marriage is in existence and in any circumstances of the matter, the said marriage with the present petitioner is the second marriage and hence, not entitled for maintenance.

14. As far as not having family, social and legal status to the petitioner in the society as held by the lower Appellate Court are concerned, I may say that the photographs (Exs.15 to 30) produced on record of this case shows that the respondent No.2 used to attend the marriage ceremonies taken place in the family of the petitioner as a nearest relative. Moreover, other photographs of the petitioner with the respondent No.2 produced on record also shows that there existed a thick relation between them. In short, Exs.15 to 30 supports the say of the present petitioner that they were staying together as wife and husband and even in Society also, they have presented themselves as wife and husband. Therefore, the petitioner is able to prove her case in view of the laid down by the Apex Court in Dwarika Prasad's case (Supra) for the purpose of maintenance

under Sec.125 of Cr.P.C. It is required to be noted that standard of prove for granting maintenance under Sec.125, Cr.P.C. as well as in other Act will be quite different. In view of the aforesaid, the judgment and order passed by the learned Addl. City Sessions Judge, Ahmedabad, is required to be quashed and set aside and the judgment and order passed by the learned Metropolitan Magistrate, Ahmedabad, is required to be confirmed.

15. As a result of the foregoing discussion, this petition is allowed. The judgment and order dated 27-5-1997 passed by the learned Addl. City Sessions Judge, Court No.12, Ahmedabad in Criminal Revision Application No.56 of 1997 is quashed and set aside. The judgment and order dated 13-12-1996 passed by the learned Metropolitan Magistrate, Court No.9, Ahmedabad, in Misc. Criminal Application No.109 of 1996 is hereby confirmed. The respondent No.2 is directed to pay the maintenance to the petitioner regularly and should also clear the arrears within a period of six months from today. Rule is made absolute accordingly.

(R.P.DHOLAKIA,J.)
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